months and that the first, of 1984, was between three parties whereas the second, of 1986, was between the plaintiff and the defendant only. The suggestion that both transactions should be treated as one transaction is devoid of merit and can and is rejected summarily.

The next point made is that s 132C(i) of the Companies Act was not complied with. However, Charlotte Ng, a director of the plaintiff company and one of its four shareholders, has stated otherwise by affidavit. That was an issue taken up by the defendant and effectively dealt with by the plaintiff by affidavit evidence. The suggestion appears to be that such a fact has to be pleaded. Such a suggestion has no merit. It is ridiculous to suggest that every time a company sues on a contract it has in its statement of claim vis-à-vis the contract to plead more than that it had entered into the contract on which the suit is based.

Another point taken up was that the transaction was ultra vires the company. Section 20 of the Companies Act provides that an outsider, other than a debenture holder or the minister, may not raise ultra vires. The defendant is an outsider and not a debenture holder or the minister.

Encik Murthi then sought to contend that for specific performance good consideration is not good enough and that there should be valuable consideration. I do not know of such a rule per se and the rationale for such a rule, if there is such a rule. In any event in the instant case it is not disputed that there was a restructuring of the corporation involved when the parties decided to go their separate ways. Part of the restructuring exercise was apparently completed in 1984. What was left was for the defendant to complete the 1986 sale of the shares. It would be most inequitable and unconscionable to allow the defendant at this stage, having agreed that each of the parties should go its separate way and after allowing the earlier and connected transaction to be duly completed, to seek the aid of equity to avoid its legal obligations.

It was also submitted that a contract for the sale of shares is not a proper subject for specific performance. The authorities show that a seller of shares not freely saleable in the open market is entitled to specific performance (see *Duncuft* v *Albrecht*,[1] *Gan Realty Sdn Bhd* v *Nicholas & Ors*,[2] *Turner* v *Bladin*[3] and *Odessa Tramways Co* v *Mendel*.[4] The clincher of course is that (as has been seen) the defendant and its related or subsidiary companies in fact own the majority of the shares of Seasian which I think makes it a textbook example of a contract for the sale of shares that will be enforced by specific performance.

*Order accordingly.*

Solicitors: *Mah-Kok & Din*; *Murthi & Partners*.

Reported by *Ng Sheau Jiuan*

## Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor

HIGH COURT (PENANG) – CIVIL SUIT NO 22-34-86
MOHAMED DZAIDDIN J
8 FEBRUARY 1988

*Civil Procedure – Amendment of pleadings – Application for – Plea of fraud to be added in statement of writ – Delay in application to amend – Tactical manoeuvre – Principles governing amendment of pleadings – Rules of the High Court 1980, O 20 r 5(1)*

The plaintiffs commenced an action against the defendants for a declaration that the sale of a piece of land to the first defendant was null and void and that the said land was free from any charge registered in favour of the second defendant. The second defendant filed an application for an order that the plaintiffs' writ be struck out under O 18 r 19 of the Rules of the High Court 1980. But before their application was heard, the plaintiffs filed an application for leave to amend their writ under O 20 r 5(1) of the Rules of the High Court by pleading fraud against the second defendant. The second defendant opposed the plaintiffs' application on the ground, inter alia, that the plaintiffs had taken a long time to file their application and that it was not made bona fide. The second defendant also contended that had his application to strike out the writ been heard earlier, he would have been successful and the plaintiffs could not have made this application.

**Held,** dismissing the plaintiffs' application:

(1) The rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. However, there are two circumstances in which an amendment to add an allegation of fraud would not be permitted: (a) where the facts giving rise to the plea of fraud were known at the time of the original pleading and (b) where the delay in pleading fraud was in connection with some tactical manoeuvre.

(2) In the present case, there has been considerable delay on the part of the plaintiffs to make an application to amend their pleadings. This delay was to avoid the original writ and statement of claim from being struck out. It was thus a tactical manoeuvre.

(3) Looking at the original claim, it was obvious that the facts giving rise to the plea of fraud were known to the plaintiffs or their solicitors much earlier.

**Cases referred to**

1 *Yamaha Motor Co Ltd* v *Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (folld)
2 *Lawrance* v *Lord Norreys* (1888) 39 Ch D 213 (refd)
3 *Hajah Rajiah bte Haji Man* v *Tai Cheng Finance Bhd* [1987] 2 CLJ 154 (refd)
4 *Clarapede & Co* v *Commercial Union Association* (1883) 32 WR 262 (folld)
5 *Atkinson* v *Fitzwalter & Ors* [1987] 1 WLR 201 (folld)

**Legislation referred to**

Rules of the High Court 1980 O 18 r 19, O 20 r 5(1)

*Lim Leng Han* for the plaintiffs.
*G Krishnan* for the first defendant.
*Gerard Chan Weng Yew* for the second defendant.

*Cur Adv Vult*

**Mohamed Dzaiddin J:** This is an application by the plaintiffs for leave to amend their writ of summons indorsed with the statement of claim under O 20 r 5(1) of the Rules of the High Court 1980.

Mr Gerard Chan, counsel for the second defendant, objected to this application as affecting his client. One would have thought that since the decision of the Federal Court in *Yamaha Motor Co Ltd* v *Yamaha Malaysia Sdn Bhd & Ors*,[1] any application for amendments made in our courts would as a matter of course be granted. Alas, this is not so and we shall shortly see why in the present application it should not be so.

Let me briefly state the background to the present application. On 27 May 1986, the plaintiffs commenced an action against the defendants for a declaration that the sale of a piece of land known as lot 2841, mukim 13, North-East District, Penang ('the said land') to the first defendant was null and void and that they are the owners of the said land free from any charge registered in favour of the second defendant. It will be seen from their statement of claim that their claim and the prayer seeking relief against the second defendant are pleaded in the following manner:

> (10) Upon the promise and covenants by the first defendant to deliver the said houses duly completed fit for immediate occupation and land to the plaintiffs or their nominees the plaintiffs duly executed and transferred the said property to the first defendant; the said memorandum of transfer was duly registered at the Registry of Land Titles on 23 August 1980.
>
> (11) Without notice to and or consent of the plaintiffs, the first defendant wrongfully charged the said property to Tai Cheng Finance Bhd the second defendant abovenamed as security for a loan of $700,000 granted by the second defendant to the first defendant.

The prayer against the second defendant reads as follows:

> (a) The said sale of lot 2841, mukim 13, North-East District, Penang, be declared null and void.
> (b) A declaration that the plaintiffs are the owners of the said property freed and discharged of the charge in favour of the second defendant.
> (c) ...
> (d) Damages.

Pausing here, it should be observed that the above paragraphs merely pray for reliefs against the first defendant, and a declaration against the second defendant appears to me to be consequential.

On 4 July 1986, the second defendant entered an appearance. Soon after the entry of an appearance, the second defendant through their solicitors filed an application by summons-in-chambers on 8 July 1986 for an order that the said writ indorsed with the statement of claim be struck out under O 18 r 19 of the Rules of the High Court 1980 as it discloses no reasonable cause of action against them. Unfortunately, this application failed to get the immediate attention of the High Court registry and was not fixed for hearing until about one year after the filing date when suddenly the solicitors were informed that the matter had been fixed on 20 July 1987.

In the meantime, on 22 April 1987, the plaintiffs filed the present application and hearing was fixed on the same day as the second defendant's application for striking out the writ. However, in view of this application for amendment requiring to be heard first, the latter application has been adjourned to another date.

In the present application, the plaintiffs proposed to amend their writ and the statement of claim by pleading fraud against the second defendant. The proposed new paras 11A and 13A read as follows:

> 11A The plaintiffs aver that the said charge and/or its registration was obtained by fraud and/or collusion of the second defendant with the first defendant. The second defendant or its agent(s) is a party or privy to the said fraud.
>
> Particulars
>
> (i) The second defendant had knowledge or ought reasonably to have knowledge of the existence of the agreement dated 5 December 1979 and/or agreements dated 17 October 1979 before the abovesaid loan and charge transactions were entered into.
> (ii) The second defendant knew or ought to know that the first defendant had no authority to charge the said property. The second defendant knew or ought to have known that the first defendant at all material times had only paid to account of the purchase price the sum of $2,000 only and that the balance purchase price of $798,000 had not been paid for.
> (iii) When the first defendant approached the second defendant for the said loan sometime before 17 October 1979, the second defendant knew or ought to have known from its investigation and/or inquiries that the plaintiffs were still the registered owners of the said property.
> (iv) The second defendant had known or ought to have known of the sale of the said houses and lands to the plaintiff's nominees.
> (v) The second defendant knew that the repayment of the said loan by the first defendant was to come from the proceeds of sale of the houses in the said housing scheme.
> (vi) The second defendant knew or ought reasonably to have known that the first defendant as developers of the said housing scheme had sold and was bound by contract of sale to give a good title free from encumbrance to purchasers of houses in the said scheme which include the plaintiffs.
> (vii) Notwithstanding the knowledge and/or notice abovesaid, the second defendant went ahead to enter into the loan and charge transactions with the first defendant.
>
> 13A And the plaintiffs pray against the second defendant for the following orders and/or reliefs:

(a) A declaration that the plaintiffs are the owners of the said property freed and discharged of the charge against the second defendant.
(b) That the charge in favour of the second defendant be deleted and expunged from the register document of title of the said property.
(c) Damages.
(d) Costs.
(e) Such further and other reliefs.

Mr Chan, in his submission, opposed this application on the following grounds. First, the plaintiffs in their affidavit in support affirmed by their solicitor, Mr Foong Kai Choong, did not disclose any reasons for the amendments, other than stating that the original statement of claim did not specifically set out the plaintiffs' claim, the remedy and reliefs which they are entitled to seek against the defendants and that the defendants would not incur any injustice. According to Mr Chan, in any amendment to plead fraud, the plaintiffs should disclose their reason, if any, why it was omitted earlier: see *Lawrance* v *Lord Norreys*.[2]

Secondly, the plaintiffs had taken a long time to file their application. The second defendant verily believed that the plaintiffs were waiting for a decision in another case where the second defendant, as the registered chargee, had applied to remove a caveat against certain land on the ground that there was no cause of action against them. The decision was handed down on 21 August 1986 whereby the court allowed the second defendant's application: see *Hajah Rajiah bte Haji Man* v *Tai Cheng Finance Bhd*.[3]

Thirdly, from the facts and circumstances, the application was not bona fide.

Fourthly, there was no cause of action against the second defendant and there was no relief prayed against them in the original statement of claim. Counsel submitted that had his application to strike out the writ and statement of claim under O 18 r 19 of the Rules of the High Court been heard earlier than the present application, the second defendant would have been successful and the plaintiffs could not have made this application.

Mr Lim, for the plaintiffs, relied on the principles of *Yamaha*[1] and submitted that the application was made bona fide to include the issue of fraud in the pleading. Some of the facts were not known earlier to the plaintiffs.

The general principle of amendments of pleadings has clearly been enunciated in *Yamaha*[1] following some of the well-known English cases decided for over a century. In *Clarapede & Co* v *Commercial Union Association*,[4] Brett MR stated as follows:

> The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without prejudice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them in such a position that they must be injured it ought not to be made.

In *Yamaha*,[1] the appellant applied for leave to amend the amended statement of claim which would have the effect of pleading fraud or unlawful conspiracy after the pleadings were closed. The Federal Court in allowing the appellant's application stated that the rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. It says that three basic questions should be considered to determine whether injustice would or would not result: (1) whether the application is made bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in fact turn the suit from one character into a suit of another and inconsistent character. If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceeding.

Since *Yamaha*,[1] the English courts have had occasion to restate the rule governing amendments of pleadings for the purpose of adding a plea of fraud. The commentary in *The Supreme Court Practice 1985* under 20/5-8/22 at p 346 reads as follows:

> Fraud, adding allegation of – Although it has been stated that it is 'the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance' (per Lord Esher MR in *Bentley* v *Black* (1893) 9 TLR 580; cf *Hendriks* v *Montagu* (1893) 17 Ch D 638, p 642; *Symonds* v *City Bank* (1885) 34 WR 364; *Lever* v *Goodwin* [1887] WN 107, CA) yet such an amendment is allowed at an early stage; and in special circumstances at the trial though an adjournment would usually be granted, see *Riding* v *Hawkins* (1889) 14 PD 56. But such an amendment should not be allowed by the Court of Appeal (*Bradford, etc, Building Society* v *Borders* [1941] 2 All ER 205).

In *Atkinson* v *Fitzwalter & Ors*[5] the plaintiff claimed damages from the defendants, alleging that words published by them in a television programme broadcast in June 1984 were defamatory of him. In October 1984, the defendants served a defence in which they denied that the words complained of referred to or were understood to refer to the plaintiff, or that in their natural and ordinary meaning the words were defamatory of him. In April 1986, shortly before the action was due to be tried, the defendants applied for the case to be stood out of the list and for leave to amend their defence to plead justification and fair comment, the effect of which would be to justify the plaintiff's complaint that the programme alleged fraud against him. The judge granted the defendant's applications.

On appeal by the plaintiff it was held by the Court of Appeal that, as a general principle, a party to litigation

should be permitted to amend his pleadings at any stage in order that all matters in controversy between the parties should be before the court, provided that to do so would not cause injustice to other parties which could not be adequately compensated in money; that there was no rule that allegations of fraud had to be pleaded at the outset and could not be added by amendment; and that, accordingly, the court in the exercise of its discretion could grant a defendant to a defamation action leave to amend the defence to plead justification and fair comment even though the plea was added in circumstances where the plaintiff was alleging that the meaning of the words used amounted to an allegation of fraud.

Stocker LJ, in his judgment at p 219, identified two circumstances in which an amendment to add an allegation of fraud would not be permitted: 'where the facts giving rise to the plea of fraud were all known at the time of the original pleading and certainly where the failure to plead such facts could amount to 'overreaching' or where the delay in pleading fraud was in connection with some tactical manoeuvre.'

The *Cambridge Law Journal* 1987 at p 232 has described the above decision as 'a decision remarkable for its consistent adherence to the principles ... The Court of Appeal held that amendments involving allegations of fraud could be made at a late stage. It would appear that this decision will be effective in sweeping away many inconclusive cases'.

In the present application, after having examined the facts and circumstances my findings are as follows:

(1) The original writ and the statement of claim, prima facie, do not contain any specific allegation of reliefs against the second defendant. Whatever was prayed in para 13(b) in the statement of claim appears to be consequential of the specific prayer for a declaration against the first defendant.

(2) There has been considerable delay on the part of the plaintiffs to make this application. The amendments should be allowed however late the proposed amendment is, if it can be made without prejudice to the opposite party. However, in the present application, one has to view the question of delay in the light of the following factors. First, can the plaintiffs succeed in their claim against the second defendant on the original pleading? In all probability, they cannot. They would have faced the same problem and obstacle as the respondent in *Hajah Rajiah*[3] had the second defendant's application under O 18 r 19 been heard within a reasonable period after the said application was filed and before the present application. Secondly, their delay in filing this application must have something to do with the outcome of the decision in *Hajah Rajiah*.[3] Hence, this application for amendment was made to avoid the original writ and the statement of claim from being struck out. It is this situation that Stocker LJ called a 'tactical manoeuvre'.

(3) Looking at the original claim, it is quite obvious that the facts giving rise to the plea of fraud were known to the plaintiffs or their solicitors much earlier. Clearly, the plaintiffs' cause of action is based on a written agreement for the sale of the property by them to the first defendant, a housing developer. The first defendant had defaulted in the payment of the balance of the purchase price. However, as a set-off and in lieu of the payment of the balance, the parties entered into another agreement whereby the first defendant would transfer to the plaintiffs a few units of the duly completed houses and a certain portion of the said land designated for further development. The plaintiffs now allege that while these agreements were in existence, the first defendant charged the entire property to the second defendant as security for a loan of $700,000 given by the second defendant to the first defendant and that the second defendant should have known about them. That being the position, the plaintiffs or their solicitors must equally be aware of the charge had a Land Office search been made. I cannot accept Mr Lim's submission that the facts were not known to the plaintiffs or that they had inadvertently omitted to plead in the original claim. Even the supporting affidavit of the plaintiffs did not depose anything to this effect.

(4) Finally, it is as clear as day to me that both *Yamaha*[1] and *Atkinson*[5] have crystallized the principle governing amendments of pleadings which was first enunciated in 1883 in *Clarapede*.[4] They are, however, not without exceptions. In the case of adding fraud, according to Stocker LJ in *Atkinson*,[5] they cannot be allowed if the facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre. In the present case, Mr Chan has succeeded in persuading me to accept the exceptions identified by Stocker LJ as being relevant.

Therefore, for the above reasons, I must disallow the plaintiffs' application for leave to amend their pleading with costs. In addition, I give costs to the first defendant.

*Order accordingly.*

Solicitors: *Johari Goh & Associates; Krishnan & Co; Lim Kean Siew.*

Reported by *Ng Sheau Jiuan*